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SUPREME COURT CASE NO.

the Supreme Court of the United States

October Term, 1980

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and BOB BERGLAND, Secretary of Agriculture,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, AMERICAN FRUIT PURVEYORS, INC., respectfully presents the questions set forth hereinbelow for consideration on the review of the Judgment entered by the United States Court of Appeals for the Fifth Circuit.

1. WHETHER THE SUMMARY AND ARBITRARY FINDING OF "WILLFULNESS" BY THE DEPARTMENT OF AGRICULTURE IN A PROCEEDING FOR THE SUSPENSION OF LICENSE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT HAS UNLAWFULLY DEPRIVED PETITIONER OF ITS FUNDAMENTAL RIGHTS TO NOTICE OF THE UNAUTHORIZED CONDUCT AND THE OPPORTUNITY TO ACHIEVE COMPLIANCE AS MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT.

2. WHETHER THE INITIATION OF THE DISCIPLINARY PROCEEDING AGAINST PETITIONER AND THE IMPOSITION OF A HARSH PUNISHMENT AGAINST PETITIONER IS A RESULT OF THE UNLAWFUL SELECTIVE ENFORCEMENT OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT BY THE DEPARTMENT OF AGRICULTURE.

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SUPREME COURT CASE NO. _____

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AMERICAN FRUIT PURVEYORS, INC.,
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UNITED STATES OF AMERICA
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Petitioner, AMERICAN FRUIT PURVEYORS, INC., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 13, 1980 and the denial of the Petition for Rehearing entered on December 11, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 632 F.2d 1105 (5th Cir. 1980). The denial of the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit has not been reported in the latest available edition of the Federal Reporter at the time of the preparation of this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 13, 1980 and the Petition for Rehearing was denied on December 11, 1980. The respective copies of the Judgment and accompanying Opinion rendered on November 13, 1980 and the Denial of the Petition for Rehearing are appended to this Petition for Writ of Certiorari in the Appendix at pages 1 - 8.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. Review on certiorari is sought on the grounds that the Fifth Circuit Court of Appeals has sanctioned a serious departure from the accepted and usual course of judicial proceedings or, in this case, quasi-judicial proceedings conducted by the United States Department of Agriculture, which calls for the exercise of this Court's supervisory power. Petitioner further submits that the Federal question decided by the Fifth Circuit Court of Appeals is in conflict with decision rendered by the Second Circuit Court of Appeals in *Economou v. United States Department of Agriculture*, 494 F.2d 519 (2nd Cir. 1974).

Specifically, the Federal question involved in the instant case is the construction of the portion of the Administrative Procedure Act, pertaining to the suspension of a license. The Act, as cofidied in 5 U.S.C. 558, provides that a license may not be subject to disciplinary action unless the licensee is first given notice by the agency in writing of the unlawful conduct and the opportunity to demonstrate compliance with all lawful requirements, unless the violation is "willful". In the instant case, and in a substantial number of similar cases, the Department of Agriculture circumvented the purpose of the

Administrative Procedure Act by failing to furnish Petitioner with notice of its violations and an opportunity to cure same and excusing said failures by their summary findings of "willfulness". While the Fifth Circuit sanctioned the lower Court's approval of this type of procedure, the Second Circuit did not; hence, the conflict between the two Federal Courts which compels this Court's intervention in the matter. The secondary and related issue presented is the selective enforcement practices of the Department of Agriculture. The aforementioned grounds for review are presented to this Court pursuant to Rule 17.1 (a) and (c), Rules of the Supreme Court.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The relevant portions of the applicable statutes, rules, and regulations involved in the case at bar are set forth hereinbelow:

5 U.S.C. 558(c)

> (c) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given —
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

7 U.S.C. 499h(b)(4)

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –
>
> For any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction.

7 U.S.C. 499h(a)

> (a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499h(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or order, suspend the license of such offender for a period not to exceed ninty days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

Title 7, C.F.R. 46.2(aa)(5)

> ["Full payment promptly"] – Payment for produce purchased by a buyer within ten (10) days after the day on which the produce is accepted.

Title 7, C.F.R., 46.2(aa)(9)

> The parties may by express agreement at the time the contract is made, provide a different time for payment and if they have so agreed, then payment within the time provided shall constitute "full payment promptly" . . . the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.

STATEMENT OF THE CASE

The disciplinary proceeding against Petitioner was initiated by a Complaint filed by the Director of Fruit and Vegetable Division, Agricultural Marketing Services, United States Department of Agriculture, on July 30, 1976. The Complaint alleges that Petitioner herein purchased and accepted from two (2) sellers in interstate commerce, VIC MAHN's, INC., and SUNNY FARMS, INC., twenty (20) lots of perishable agricultural commodities during the period July through September, 1974, and that Petitioner failed to make full payment promptly in the aggregate amount of $84,996.66 in violation of 7 U.S.C. 499h(b)(4). At the time the reparation order in the case involving VIC MAHN's, INC., was entered, Petitioner had reduced the outstanding balance to $31,076.66, plus interest. Similarly, Petitioner had reduced the balance due to SUNNY FARMS, INC., to $13,000.00, plus interest at the time the reparation order was entered.

The Complaint included the mandate of a Decision and Order issued in PACA Docket No. 2-1574, *In Re: American Fruit Purveyors, Inc., Respondent*, 30 A.D. 1542 (1971), on October 29, 1971, in which a finding was

made that the Petitioner repeatedly and wilfully violated Section 2 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) through its failure to make full payment promptly for perishable agricultural commodities purchased and received in interstate commerce. The Order suspended Petitioner's license for fourteen (14) days. The suspension was stayed, however, on the condition that the Petitioner did not, within four (4) years following the effective date of the Order and after an opportunity for a hearing,

> "Knowingly fail to pay for produce within the specific periods provided for in the regulation unless (i) the Respondent entered into an express agreement for a definite time period within which payment must be made; (ii) such agreement is reflected in a written confirmation, memorandum, or other document prepared with respect to the transaction; and (iii) the Respondent pays within such agreed period".

The Complaint requested that the fourteen (14) day suspension of Petitioner's license be reinstated because of additional violations concerning late payments made to VIC MAHN's INC., and SUNNY FARMS, INC., during the period July, 1974, through September, 1974, in contravention of the Judicial Officer's Order of October 29, 1979. In addition, the Complaint sought the additional penalty of a ninety (90) day suspension to run consecutively with the fourteen (14) day suspension.

Petitioner filed an Answer on August 24, 1976, admitting the purchase of the commodities at issue between July and September, 1974, but denying the failure to make full payments promptly. The Petitioner

contends that agreements extending the ten (10) day statutory payment period were entered into between itself, on one hand, and VIC MAHN's, INC. and SUNNY FARMS, INC., on the other hand.

The Decision of Administrative Law Judge, JOHN G. LIEBERT, rendered on May 14, 1979, suspended Petitioner's license for a period of fourteen (14) days for violation of an Order of the Judicial Officer entered on October 29, 1971, and affirmed on January 17, 1972, concerning a previous disciplinary proceeding and Petitioner's license was suspended for an additional seven (7) days for the violation constituting the subject matter of the disciplinary proceeding at issue here.

An Appeal Petition was filed on behalf of Petitioner, AMERICAN FRUIT PURVEYORS, INC., pursuant to Section 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145), to appeal the Decision of the Administrative Law Judge, JOHN G. LIEBERT.

Judicial Officer, DONALD CAMPBELL, issued his Decision and Order in this cause on September 28, 1979 without the benefit of oral argument. The Decision of Administrative Law Judge, JOHN LIEBERT, was adopted as the final Decision herein, with the exception of pages 15-21 of said initial Decision concerning Judge LIEBERT's rationale for imposing a seven (7) day additional suspension. Judicial Officer, DONALD CAMPBELL, ordered an additional thirty (30) day suspension, said suspension to run consecutively with the reinstated fourteen (14) day suspension imposed in the Decision and Order rendered in January 17, 1972.

The Petitioner filed a Petition to Reconsider the Decision of the Judicial Officer. Judicial Officer, DONALD A. CAMPBELL entered his Denial of Petition to Reconsider on October 17, 1979. The Petition to Set Aside the Suspension of License was filed on November 26, 1979, in the United States Court of Appeals for the Fifth Circuit. The jurisdiction of the United States Court of Appeals was invoked, pursuant to 28 U.S.C. 2342(2) and Rule 15 of the Federal Rules of Appellate Procedure. Venue properly rested in the Fifth Circuit Court of Appeals under 28 U.S.C. 2343, based upon the location of Petitioner's principal place of business in Miami Beach, Florida.

This is a Petition for Writ of Certiorari to the Supreme Court of the United States of America. The certiorari jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1) to set aside the Judgment entered on November 13, 1980, and the denial of the Petition for Rehearing on December 11, 1980, by the Fifth Circuit Court of Appeals in Case Number 79-3815.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is predicated upon Rule 19(b), Supreme Court Rules, which provides, in pertinent part, for the exercise of this Court's supervisory power where the lower court has sanctioned a departure from the accepted and usual course of judicial proceedings and where an important question of Federal law should be settled by the Supreme Court, based upon a conflict between the decisions of two or

more Federal courts. Specifically, this Petition shall focus on the central issue of whether Petitioner and, by implication, other entities similarly situated, has been denied the fundamental rights of due process of law by the summary finding of "willfulness" and the selective enforcement of the Perishable Agricultural Commodites Act (PACA) by the Department of Agriculture.

Petitioner respectfully submits that the Department's persistent and cavalier disregard for the letter and the spirit of the Administrative Procedure Act and its inconsistent and capricious pattern of initiating disciplinary action against its licensees compels this limited review of the PACA regulatory scheme by this Court on certiorari. Notwithstanding the limited scope of judicial review of the discretionary actions of administrative agencies, Petitioner submits that the pernicious exercise of administrative action by the Department of Agriculture merits judicial attention just as if a Federal or State agency perpetrated a pattern of discrimination against particular racial, ethnic, religious, or age groups. Petitioner further submits that the trend of previous judicial tolerance of selective enforcement will not be, and should not be, acceptable in the future based upon this Court's decision to evaluate the alleged unconstitutionally discriminatory prosecution of *Hustler* magazine publisher, Larry Flynt, by the city of Cleveland, Ohio.

1. WHETHER THE SUMMARY AND ARBITRARY FINDING OF "WILLFULNESS" BY THE DEPARTMENT OF AGRICULTURE IN A PROCEEDING FOR THE SUSPENSION OF LICENSE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT HAS

UNLAWFULLY DEPRIVED PETITIONER OF ITS FUNDAMENTAL RIGHTS TO NOTICE OF THE UNAUTHORIZED CONDUCT AND THE OPPORTUNITY TO ACHIEVE COMPLIANCE AS MANDATED BY THE ADMINISTRATIVE PROCEDURE ACT.

Petitioner respectfully submits that the summary finding of "willfulness" in this case was made by the Department of Agriculture to subvert the due process requirements of 5 U.S.C. 558(c). The preliminary issue for determination by this Court is whether the violations of the Perishable Agricultural Commodities Act were "willful" and, if so, whether that finding was sufficient to excuse the failure to provide notice of the violations and provide the opportunity to achieve compliance with all lawful requirements.

Petitioner will readily concede that the term "willfulness" has been defined as the careless disregard of the statutory requirements by this Court in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973).

The Court noted that:

> "The Court of Appeals agreed that 7 U.S.C. 204 authorized the Secretary to suspend 'any registrant found in violation of the Act', 454 F.2d, at 113, that the suspension procedure here satisfied the *relevant requirements of the Administrative Procedure Act*, 5 U.S.C. 558, and that 'the evidence indicates that (respondent) acted with careless disregard of

> the statutory requirements and thus meets the test of 'wilfullness'." *Id.* at 185. (emphasis supplied).

In the instant case, Judicial Officer, DONALD CAMPBELL, conceded in his Decision and Order dated September 28, 1979, that no notice was ever given to Petitioner regarding the violations alleged. It logically follows that no opportunity was given to Petitioner to demonstrate or achieve compliance with all lawful requirements of the Perishable Agricultural Commodities Act.

In addition, the requirements of 5 U.S.C. 558(c) were similarly ignored earlier case involving this Petitioner, *In re American Fruit Purveyor's Inc.*, 30 A.D. 1542 (1971). In the earlier case, a disciplinary proceeding was initiated against Petitioner, even though Petitioner was not given notice of the violations. A decision was rendered against Petitioner, although the sanction was suspended.

The Second Circuit Court of Appeals went one step further than the *American Fruit* Court and set aside the Order entered in a disciplinary proceeding.

The Court held that:

> " . . . the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on

the record taken as a whole, and the sanctions imposed unwarranted."

Economou v. United States Department of Agriculture, 494 F.2d 519 (2d Cir. 1974).

In the instant case, the Administrative Law Judge and the Judicial Officer emphasized that the Petitioner had been the subject of an earlier disciplinary proceeding based upon late payment practices, which allegedly imparted constructive notice to Petitioner that its conduct in this case was unauthorized under the Perishable Agricultural Commodities Act. Petitioner would submit that this reasoning essentially constitutes notice under one theory and one cause of action and a decision on another theory and cause of action. When an administrative agency decides a case on a basis other than that upon which it was brought, such as the interjection of the history of prior violations, the denial of the petition to set aside the penalty imposed should be overturned. *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968). Despite any probative value and relevance to the choice and severity of the sanction, due process requires that any case, whether civil, criminal, or administrative, should be decided on its own particular facts, regardless of the prior history of any party involved.

Petitioner respectfully submits that the Fifth Circuit Court of Appeals, notwithstanding its limited scope of judicial review, has sanctioned a serious departure from the accepted and usual course of judicial proceedings by ignoring the failure to provide notice to Petitioner of the facts and conduct constituting the violations alleged in the current disciplinary proceeding and the

consequent failure to provide Petitioner with the opportunity to cure said violations. Petitioner respectfully prays that this Honorable Court exercise its supervisory power to remedy this departure from law by clarifying and reconciling, in terms of the constitutional standards of due process of law, Section 9 of the Administrative Procedure Act, as codified in 5 U.S.C. 558(c). It is submitted that the "willfulness" exception set forth in 5 U.S.C. 558(c), as summarily and indiscriminately applied by the Department of Agriculture, does not comport with the due process clause of the Fifth Amendment to the United States Constitution.

2. WHETHER THE INITIATION OF THE DISCIPLINARY PROCEEDING AGAINST THE PETITIONER AND THE IMPOSITION OF A HARSH PUNISHMENT AGAINST PETITIONER IS A RESULT OF THE UNLAWFUL SELECTIVE ENFORCEMENT OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT BY THE DEPARTMENT OF AGRICULTURE.

Petitioner respectfully submits that the disciplinary proceeding initiated against Petitioner, and the harsh punishment prescribed therein, is an impermissable result of the selective enforcement practices of the Department of Agriculture. The scope of judicial review of administrative action has been succinctly summarized by this Court in *Butz v. Glover Livestock*, supra:

> "We cannot disturb the action of the Secretary, as accomplished through the judicial officer, so long as the proceedings were properly

> conducted in accordance with constitutional and statutory standards, unless the judgment is 'unwarranted in law . . . without justification in fact'. *Id.*, at 185-86, quoting *American Power Co. v. S.E.C.*, 329 U.S. 90, at 112-13 (1943). (emphasis supplied).

The standard review as to the penalty imposed is that judicial action is warranted only if the penalty is "arbitrary, capricious, or unauthorized at law." *J. Acevedo and Sons v. United States*, 524 F.2d 977 (5th Cir. 1975).

The testimony of Robert Grainger, a marketing specialist employed by the Department of Agriculture, was elicited at trial in support of Petitioner's contention that no explicit guidelines were employed by the Department of Agriculture in the selection of parties it decides to prosecute. This pattern of selective enforcement was callously sanctioned by Judicial Officer, DONALD CAMPBELL, who stated, at page 21 of his Decision and Order:

> "But even if a particular violator were singled out for selective enforcement of the Act, such action would be legal so long as the administrative determination was not arbitrary." (see *Moog Industries, Inc. v. F.T.C.*, 335 U.S. 411, 413-414; *F.T.C. v. Universal-Rundle Corp.*, 387 U.S. 244, 251-252; see also *Union Stock Yard Co. v. United States*, 308 U.S. 213, 222-224).

Petitioner submits that the case cited by Judicial Officer, DONALD CAMPBELL, has been negated by this Court's recent decision to hear *Hustler* magazine

publisher Larry Flynt's contention that he was the victim of unconstitutionally discriminatory prosecution by the city of Cleveland, Ohio. Although Petitioner is not a figure of public notoriety such as Mr. Flynt, Petitioner asserts that he is a figure of notoriety in the regulatory body governing the produce business, the Department of Agriculture.

Petitioner asserts that he is a victim of unconstitutionally discriminatory selective enforcement by the Department of Agriculture by virtue of the fact that he did not receive the customary warning letters from the Department of Agriculture in either of the two disciplinary proceedings to which he has been a party. This contention is further bolstered by the fact that Judicial Officer, DONALD CAMPBELL, ignored his own observation that it is the policy of the Judicial Officer never to increase the sanction recommended by the Administrative officials. In this case, the additional suspension of seven (7) days ordered by the Administrative Law Judge was increased to thirty (30) days by the Judicial Officer, to run consecutively with the re-imposed suspension from the 1972 disciplinary proceeding.

Petitioner submits that the unusually harsh sanction is a gross abuse of discretion by the Judicial Officer, the single person in whom is vested the final administrative authority of the Department of Agriculture pursuant to 7 C.F.R. 2.35. Since the punishment was imposed as the direct result of the selective enforcement practices of the Department of Agriculture, the harsh punishment is arbitrary, capricious, and unauthorized at law. Accordingly, Petitioner respectfully prays that this Court remand this cause to the United States Court of Appeals with directions to set aside the suspension of license.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Appendix

A– Opinion of the United States Court of Appeals, Fifth Circuit

B– Judgment of the United States Court of Appeals, Fifth Circuit

C– Order of Denial of the Petition for Rehearing of the United States Court of Appeals, Fifth Circuit

D– 28 U.S.C. 1254

E– Rule 17, Rules of the Supreme Court

F.– Fifth Amendment to the United States Constitution

AMERICAN FRUIT PURVEYORS, INC.
Petitioner,

vs.

UNITED STATES of America and Bob Bergland,
Secretary of Agriculture,
Respondent.

No. 79-3815
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1980.

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURRIAM:

The present case is on appeal from a decision of the Secretary of the United States Department of Agriculture, through his Judicial Officer, suspending the license of American Fruit Purveyors [AFP]. AFP is a supplier of fresh and frozen fruits and vegetables to hotels, restaurants and steamship lines. The company was licensed in 1958 and has received renewal of that license annually. In 1969, AFP purchased and accepted 17 lots of vegetables, which are considered perishable agricultural commodities, from five sellers and failed to make full payment promptly. On October 29, 1971, following the filing of a complaint by the Department of Agriculture against AFP, the Judicial Officer ordered

that AFP's license be suspended for fourteen days. The Judicial Officer suspended this disciplinary action, stating that the penalty would not become effective unless AFP was found to have, within a four-year period, knowingly failed to pay for produce within the regulation guidelines' ten days period following receipt. The Judicial Officer also ruled that AFP could avoid the ten-day payment rule only if it entered into an express written agreement which stated a definite time period within which to pay and if AFP paid within such an agreed time. The four-year period began to run on February 7, 1972.

During the 1974 crop year, AFP purchased and accepted six shipments of potatoes from Sunny Farms, Inc., located in Edison, California. All orders were made orally, and no written confirmation of such transactions was made. In its usual course of business, Sunny Farms expects payment within ten days of receipt by the purchaser and would cease shipments if payment was not received within two weeks. Sunny Farms did receive a prompt payment for one shipment, but the remaining payments were not forthcoming. In order to liquidate obligations remaining on AFP's account, Sunny Farms agreed to accept postdated checks. A number of these checks were returned due to insufficient funds. In 1975, Sunny Farms filed a complaint with the Secretary of Agriculture seeking reparations. Pursuant to an order by the Judicial Officer, final payment was made by AFP in 1976.

During the same crop-year of 1974, AFP also purchased and accepted a number of shipments of fruit and vegetables from Vic Mahns, Inc., located in Pompano

Beach, Florida. No written agreement of these transactions was ever made. The original terms of the oral agreement required payment within one week of receipt, but this was later altered to a three week period. Harry Sturm, president of the corporation which owns AFP, disputed this arrangement, contending that the agreement was that AFP would pay when it was able. Again, AFP failed to pay promptly and Vic Mahns seized its shipments. Vic Mahns also agreed to accept postdated checks to liquidate AFP's account. Some of these checks were returned due to insufficient funds. Vic Mahns filed a complaint seeking reparations, and following another order of the Judicial Officer, Vic Mahns and AFP entered into a settlement agreement.

A complaint was then filed by the director of the Fruit and Vegetable Division, Agricultural Marketing Service of the USDA against AFP seeking disciplinary action under the Perishable Agricultural Commodities Act [PACA], 7 U.S.C. §§499a 499s, for failure to make payments promptly on twenty lots of perishable agricultural commodities. Following an evidentiary hearing, the Administrative Law Judge [ALJ] found the AFP had not made payments in ten days as required by §499b, that it had not entered into an express agreement for a different pay period and AFP's actions violated the order of the Judicial Officer of October 29, 1971. Based upon his findings of fact, the ALJ reinstated the fourteen day suspension issued on October 29, 1971. Although the USDA recommended an additional penalty of ninety days suspension for the 1974 violations, the ALJ imposed an additional suspension of seven days to run consecutively with the fourteen days.

Both AFP and the Department of Agriculture appealed this decision to the Judicial Officer. The Judicial Officer denied AFP's request for oral argument on the ground that no novel or complex issues were raised, the case was thoroughly briefed and oral argument would serve no useful purpose. The Judicial Officer affirmed the ALJ's decision except that portion regarding the imposition of the seven day additional suspension. The Judicial Officer, finding "a callous disregard for the requirements of the Act and the prior probationary order," increased the seven day suspension to thirty days to run consecutively, making it a total of forty-four days suspended.

A stay was subsequently entered, pending an appeal to this court. Following the grant of the stay, the Judicial Officer denied a Petition to Reconsider filed by AFP. The stay order remained in effect. AFP now raises three issues on appeal: 1) AFP did not knowingly and willfully fail to make prompt payments for twenty lots of perishable agricultural commodities; 2) AFP did satisfy the requirements of the 1971 order regarding written confirmation; 3) the Secretary of Agriculture gave no notice to AFP of the 1974 violations and found AFP guilty of a willful violation without giving it an opportunity to comply; and 4) the suspension in this case is arbitrary and capricious.

In reviewing the findings and order of the Judicial Officer of the Department of Agriculture, an appellate court may not substitute its judgment for that of the Judicial Officer, *Lewis v. Butz*, 512 F.2d 681, 683 (8th Cir. 1975), and his decision may only be overturned if it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182,

185-86, 93 S.Ct. 1455, 1457-58, 36 L.Ed.2d 142 (1973); *Noell v. Bensinger*, 586 F.2d 554, 558 (5th Cir. 1978).

7 U.S.C. §499b(4) provides in part that it shall be unlawful in any transaction in interstate commerce "for any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in [perishable agricultural commodities] to the person with whom such transaction is had . . ." The term "full payment promptly" means "payment for produce purchased by a buyer, within ten days after the day on which the produce is accepted." 7 C.F.R. §46.-2(aa)(5). The ten day rule is inapplicable if the parties by express agreement at the time of the creation of the contract provide for a different time of payment 7 C.F.R. §46.2(aa)(9).

Contrary to AFP's contention, it did not make prompt payment to Sunny Farms or Vic Mahns, Inc. AFP concedes that there was never an express written agreement with either company. The testimony from the depositions and the hearing clearly indicates that neither Vic Mahns nor Sunny Farms held their buyers to the strict ten day rule. Although both companies preferred to follow the ten day rule, they would accept payment within relatively short times following acceptance, two weeks for Sunny Farms and three weeks for Vic Mahns, Inc. In Vic Mahns, Inc.'s case, AFP and Vic Mahns specifically agreed to a three-week time period. Nonetheless AFP failed to pay within those periods and did not completely satisfy its account until after ordered to do so by the Secretary of Agriculture through the reparation proceedings.

Likewise, Sunny Farms made it clear that it desired payment within two weeks, which payments were never completely satisfied until after the Judicial Officer's decision in the reparation proceedings. The acceptance of postdated checks by Vic Mahns and Sunny Farms in an effort to liquidate their accounts can, by no stretch of the imagination, be considered prompt payment. Neither Vic Mahns nor Sunny Farms agreed to accept the postdated checks as part of the original payment agreement. Even if the acceptance of postdated checks could be considered as prompt payment, the return of a number of those postdated checks for insufficient funds would negate any claim of prompt payment.

The Judicial Officer was correct in finding that there were twenty separate violations, although AFP contends there were only two continuous transactions, one with Vic Mahns and one with Sunny Farms. Each lot was clearly a separate transaction, which is corroborated by one of Vic Mahn's sellers who stated that the sales involved were each individual orders.

Additionally, AFP violated the 1971 order during the four year period of probation. That order required any prompt payment beyond ten days to be confirmed by an express written memorandum. The order also required that AFP make payment within that agreed time. AFP did neither, and this court finds AFP's argument that the acceptance by Sunny Farms and Vic Mahns of postdated checks satisfied the requirements of the 1971 order to be wholly without merit.

AFP also contends that the Judicial Officer's decision is unwarranted in law and without justification in fact since the Department of Agriculture failed to follow

the mandates of 5 U.S.C. §558(c). Section 558(c) provides that suspension of a license is lawful only if the license is given notice and an opportunity for a hearing, except in cases of willfulness. Thus, no notice is necessary if the suspension proceeding is based on willfulness. Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Commission*, 554 F.2d 556, 562 (2d Cir. 1977); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974), *cert denied*, 419 U.S. 830, 95 S.Ct. 53, 42 L.Ed.2d 55 (1974). In light of the 1971 order, there is not possibility that AFP did not know that failure to pay promptly was a violation of the regulations and the statute and that failure to obtain an express written agreement was a knowing violation of both the regulations and the 1971 order. No notice to AFP was required in this case, and the finding of willfulness was correct.

AFP also contends that the sanction imposed is arbitrary and capricious. AFP also claims that the sanction amounts to cruel and unusual punishment under the Eighth Amendment. AFP contends that the USDA has practiced selective enforcement against it and that the Judicial Officer has arbitrary and unbridled discretion in this area. The choice of sanctions imposed by the Secretary of Agriculture, through his Judicial Officer, may not be overturned in the absence of a patent abuse of discretion. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 414, 78 S.Ct. 377, 379, 2 L.Ed.2d 370 (1958) (per curiam); *Haltmier v. Commodity Futures Trading Commission*, 554 F.2d at 563. 7 U.S.C. §499h(a) allows the Secretary to suspend a license for a period not to exceed ninety days for each violation. It

has been held that suspensions may be imposed even without a finding of intentional or fraudulent conduct. See *Maine Potato Growers, Inc. v. Butz*, 540 F.2d 518, 523 (1st Cir, 1976).

In the present case, AFP committed flagrant intentional violations of the Act, the underlying regulations and the 1971 order. Although the suspension of a license is a harsh sanction, the Judicial Officer was completely within his power and discretion in imposing a suspension of forty four days. Although the Judicial Officer possesses a great deal of discretion, this Court does not find it to be an unbridled or unreasonable amount of discretion. The Supreme Court has held that uniformity of sanctions for similar violations is not mandated by the Act. *Butz v. Glover Livestock Commission Co.*, 411 U.S. at 186, 93 S.Ct. at 1458. Merely because a sanction in one case is more severe than that imposed in a similar case does not render the sanction illegal. *Id.* at 187, 93 S.Ct. 1458. This Court perceives no bias on the part of the ALJ or the Judicial Officer in rendering their decisions. This Court also can find no evidence of selective enforcement and considers AFP's claim of cruel and unusual punishment to be inapplicable to the present case and totally without merit.

PETITION DENIED, ORDER ENFORCED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT
October Term, 19

NO. 79-3815
Summary Calendar

PACA Docket No. 2-4355

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA and
BOB BERGLAND, Secretary of Agriculture,
Respondent.

Petition for Review of an Order of the Secretary of the United States Department of Agriculture

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of American Fruit Purveyors, Inc. for review of an order of the Secretary of the United States Department of Agriculture, and was taken under submission by the Court upon the record and briefs on file pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review is denied and the order of the Secretary of the United States Department of Agriculture is enforced;

It is further ordered that petitioner pay to respondent the costs on appeal, to be taxed by the Clerk of this Court.

November 13, 1980

ISSUED AS MANDATE:

[FILED DEC 11, 1980]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3815

AMERICAN FRUIT PURVEYORS, INC.,
Petitioner,

versus

UNITED STATES OF AMERICA and
BOB BERGLAND, Secretary of Agriculture,
Respondent.

Petition for Review of an Order of the Secretary of the United States Department of Agriculture

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ON PETITION FOR REHEARING
(December 11, 1980)

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, exept in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation. (emphasis supplied as to pertinent part).

CERTIFICATE OF SERVICE

Petitioner, AMERICAN FRUIT PURVEYORS, INC., by and through its undersigned counsel, hereby certifies that three (3) true and correct copies of this Petition for Writ of Certiorari have been mailed this ___ day of January, 1981, to each of the following:

SOLICITOR GENERAL OF THE UNITED STATES
Tenth and Constitution
Northwest Washington, D.C. 20530

UNITED STATES DEPARTMENT OF
AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

I FURTHER CERTIFY that a true and correct copy of this Petition For Writ of Certiorari was mailed this _____ day of January, 1981, to each of the following:

DONALD A. CAMPBELL, JUDICIAL OFFICER
U.S. DEPARTMENT OF AGRICULTURE
Office of the Secretary
Washington, D.C. 20250

JOHN G. LIEBERT
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U.S. DEPARTMENT OF AGRICULTURE
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By _____
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